U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-T- LLC

DATE: JAN. 27, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, which describes itself as a software consulting business, seeks to permanently employ the Beneficiary in the United States as a senior quality assurance analyst. The Petitioner requests classification of the Beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The Director, Texas Service Center, denied the petition. We dismissed the subsequent appeal. The matter is now before us on a motion to reopen and a motion to reconsider. The motion to reopen and motion to reconsider will be denied.

I. BONA FIDE JOB OFFER

The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3[1] states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). The petitioner must demonstrate that it

[1] The regulatory scheme governing the foreign labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

would employ the beneficiary directly, and not that the petitioner would source the beneficiary with a third party as the actual employer.

In his December 4, 2013, decision the Director determined that the Petitioner had not established that a *bona fide* employer-employee relationship existed between itself and the Beneficiary and denied the petition. In our September 4, 2014, decision we affirmed the Director's decision. We determined that the Petitioner had not established that it would be the Beneficiary's employer because the evidence provided by the Petitioner did not detail the relationship between the Petitioner, the Beneficiary, the staffing company, and the end client.

On motion, the Petitioner asserts that it has overcome "[t]he sole basis for the Appeal denial," and has submitted sufficient evidence to establish that it is making a *bona fide* job offer.

The record includes a May 22, 2013, letter from on letterhead discussing the Beneficiary's placement. Ms. stated that the Beneficiary remained an employee of the Petitioner, but was providing consulting services to , in Maryland. Ms. did not explain the relationship between her company and either the Beneficiary or the Petitioner. As noted in our decision dismissing the appeal, the letter does not detail role in the Beneficiary's employment chain, nor does it explain who controls and supervises the Beneficiary's day-to-day employment. We further note that the letter states that will only provide the Beneficiary with an employment verification letter if requested by U.S. Citizenship and Immigration Services (USCIS). This statement contributes to the lack of clarification on role in the Beneficiary's employment chain, as it suggests that is in a position to verify the Beneficiary's employment.

The record includes a June 14, 2013, letter from on letterhead discussing the Beneficiary's work at its office in Maryland. Mr. stated that the Beneficiary is "employed with through on a contract basis as a Quality Assurance Analyst." Mr. further stated that "... does not maintain any employment [Beneficiary] [*sic*]. [Beneficiary]'s primary employer is responsible for his salary, benefits and training needed to perform his job duties at our company in addition to any discretionary decision making, such as hiring, firing, and performance evaluations." This letter does not detail role in the Beneficiary's employment chain, nor does it explain who controls and supervises the Beneficiary's day-to-day employment.

The record also includes a copy of a document entitled "Exhibit D," which is identified as an attachment to a "Master Consulting Agreement & the Flowdown provisions between & executed on January 25, 2011." In response to our July 3, 2014, request for evidence (RFE) the Petitioner submitted a copy of a "Subcontracting Agreement" between itself and dated January 25, 2011. The Petitioner asserts on motion that this "Subcontracting Agreement" is the "Master Consulting Agreement" referenced in "Exhibit D."[2] This agreement

[2] "Exhibit D" states that the Beneficiary would be paid a rate of "$40" and that the contract would be in effect from

indicates that the Petitioner is responsible to "recruit, screen, test, reference check, complete I-9 verification and assign temporary personnel to perform temporary job assignment duties at work sites." However, this document does not suggest that the Petitioner would be involved in the day-to-day supervision or direction of the Beneficiary's work.

The Petitioner submitted a copy of an "Employment Agreement" between the Petitioner and the Beneficiary dated January 31, 2011. The agreement refers to the Petitioner as "the Employer" and states that the Beneficiary "shall report back to Employer 2 time(s) per month for an evaluation of progress, performance, and goals." However, this document does not suggest that the Petitioner would be directing the Beneficiary's day-to-day activities and does not describe the roles of or of , in directing the Beneficiary's work.

The Petitioner also submitted a copy of a March 2, 2012, "Offer of Employment" made to the Beneficiary.[3] This document indicates that the Beneficiary "shall report to during his employment.

The "Offer of Employment" from the Petitioner to the Beneficiary states that the Beneficiary "shall report to ." The document does not further elaborate on the chain of command or the supervision of the Beneficiary's work and does not describe the roles of or of , in directing the Beneficiary's work.

The Petitioner asserts on motion that we over-stepped our authority and we are requiring that it provide more evidence than was necessary to prove eligibility "by a preponderance of evidence." In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Nothing in the record of proceeding contains any type of notice from the Director or any other USCIS representative that would have misled the Petitioner into its assertion that USCIS requires "convincing" or "persuading" evidence beyond what legal authority guides the agency in statute, regulatory interpretation, precedent case law and administrative law and procedure. Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence,

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January 4, 2013, through December 31, 2013. It is noted that an hourly wage of $40 equates to $83,200 per year, which is less than the proffered wage of $120,016 per year.

[3] This "Offer of Employment" states that the Beneficiary would be paid $60,000 per year, which is less than the proffered wage of $120,016 per year.

establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989).

On motion, the Petitioner submits a September 18, 2014, letter from CEO of the Petitioner, who confirmed that the subcontracting agreement is the same document that is referred to as a "Master Consulting Agreement." Mr. affirms that this agreement "confirms the project information and pay rate of [the Beneficiary]." The Petitioner also submits a September 22, 2014, letter from Recruiting Manager for Mr. also affirms that the agreement "confirms the project information and pay rate of [the Beneficiary]." Furthermore, Mr. specified that the Petitioner's "project through ended on December 6, 2013." Neither letter establishes the Petitioner's control over the Beneficiary's work.

The record does not establish that the Petitioner would be involved in the day-to-day supervision or direction of the Beneficiary's work. With its motion, the Petitioner did not provide additional evidence to overcome the deficiencies noted by the Director and by this office. Furthermore, the letter from suggests that the position of senior quality assurance analyst may no longer be available with the Petitioner, as the Petitioner's project with was completed in 2013, only six months after the labor certification was filed. The Petitioner did not submit any evidence of the continuing availability of the offered position.

In summary, the Petitioner did not establish that the Beneficiary would be its employee working under its control. Therefore, the Petitioner has not established that it is eligible to file the petition under 8 C.F.R. § 204.5(c). The Director's decision to deny the petition is affirmed.

II. ABILITY TO PAY THE PROFFERED WAGE

Beyond the decision of the Director,[4] the Petitioner has also not established its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

[4] We may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

> permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on March 4, 2013. The proffered wage as stated on the ETA Form 9089 is $120,016 per year.

The evidence in the record of proceeding shows that the Petitioner is structured as an S corporation. On the petition, the Petitioner claimed to have been established on January 1, 2005, to have a gross annual income of $3,985,416, and to currently employ 24 workers. According to the tax returns in the record, the petitioner's fiscal year follows the calendar year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the Petitioner paid the Beneficiary $54,568 in 2013. The Petitioner did not submit any evidence of wages paid to the Beneficiary in 2014.

The Petitioner has not established that it employed and paid the Beneficiary the full proffered wage, but it did establish that it paid partial wages in 2013. As the proffered wage is $120,016 per year, the Petitioner must establish that it can pay the difference between the proffered wage and the wages actually paid to the Beneficiary, that is $65,448 in 2013, and the full proffered wage of $120,016 in 2014.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, we will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.

River St. Donuts, LLC v. Napolitano, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Haw. Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
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> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River St. Donuts, 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang,* 719 F. Supp. at 537 (emphasis added).

The Petitioner's tax returns reflect net income of $68,327 in 2013 and $54,774 in 2014.[5] Therefore, in 2013 the Petitioner's net income was greater than the difference between the proffered wage and wages already paid to the Beneficiary. However, the Petitioner did not have sufficient net income in 2014 to pay the full proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The Petitioner's tax returns demonstrate end-of-year net current assets of $0 in 2013 and -$62,461 in 2014.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the Petitioner has not established that it had the continuing ability to pay the proffered wage as of the priority date through an examination of wages paid to the Beneficiary, or its net income or net current assets.

In addition, according to USCIS records, the Petitioner has filed Form I-140 petitions on behalf of eight beneficiaries in addition to the instant Beneficiary. Accordingly, the Petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). See also *Patel v. Johnson*, 2 F.Supp.3d 118, 124 (D. Mass. 2014). (upholding our denial of a petition where the petitioner did not demonstrate its ability to pay multiple beneficiaries).

The Petitioner submitted evidence that it paid six of these beneficiaries more than their proffered wage in 2013. However, the instant Beneficiary and the two remaining additional beneficiaries were paid $134,471.05 less than their combined proffered wages in 2013. The Petitioner submitted

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[5] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed January 13, 2016) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the Petitioner had additional income, credits, deductions, or other adjustments shown on the Schedule K of its tax returns, the Petitioner's net income is found on Schedule K of its tax returns for 2013 and 2014.

[6] Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. Current liabilities are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron's Educ. Series 2000).

evidence that it paid five of these beneficiaries more than their proffered wage in 2014. However, the instant Beneficiary and the three remaining additional beneficiaries were paid $205,067.23 less than their combined proffered wages in 2014. Therefore, the Petitioner has not demonstrated that it has the ability to pay the instant Beneficiary the proffered wage, as well as the proffered wages to all of its other sponsored beneficiaries.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Sonegawa,* 12 I&N Dec. at 614-15. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the Petitioner did not establish that any factors similar to *Sonegawa* existed, which would permit a conclusion that the Petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiaries, net income, and net current assets. We note that two of the employment documents referenced above suggest that the Petitioner intended to pay the Beneficiary less than the proffered wage; specifically, one document states that the contracted wage was $83,200 per year, while the "Offer of Employment" states that the Beneficiary would be paid $60,000 per year. The record includes the Petitioner's tax returns for 2009 through 2012, years preceding the instant priority date of March 2013.[7] These tax returns demonstrate that the Petitioner experienced only moderate fluctuations in its net income in the years before the priority date, and in only one year, 2010, was the Petitioner's net income and net current assets above the proffered wage. Accordingly, after considering the totality of the circumstances, the Petitioner has not established its continuing ability to pay the proffered wage to the Beneficiary since the priority date and onward.

[7] The Petitioner's 2012 tax return in the record is incomplete and includes only the first page.

III. CONCLUSION

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of T-T- LLC*, ID# 11319 (AAO Jan. 27, 2016)